

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

John B. Lennes, Jr., Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

ORDER FOR
SUMMARY DISPOSITION

vs

DKH, Inc.

Respondent.

The above-entitled matter is before Administrative Law Judge Peter C. Frickson based upon a motion for Summary Judgment filed by the Complainant. Michael J Vangelow, special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, appeared on behalf of the Complainant, Minnesota Department of Labor and Industry. The Respondent, DKH, Inc., was represented by Richard L. Swanson, Attorney at Law, 1059 Stoughton Avenue, P. O. Box 85, Inaska, Minnesota 55318. The Respondent did not, however, file a response to the Motion for Summary Judgment by the deadline imposed by the Judge.

Notice is hereby given, pursuant to Minn. Stat. 182.664, subd. 5, that this Order may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee or other authorized representatives, or any party, within thirty (30) days following the publication of said Order. The procedure for appeal is set out at Minn. Rules 5215.4900 - 5215.5250.

Based upon the Motion for Summary Judgment and affidavits submitted by the Complainant, the Administrative Law Judge makes the following:

ORDER

1. The citation and proposed penalty issued by the Minnesota Department of Labor and Industry on November 13, 1992, are hereby AFFIRMED.

2. The Respondent shall pay, forthwith, to the Minnesota Department of Labor and Industry, a penalty in the amount of \$4,700.00.

Dated this day of July, 1993.

PETER C. ERICKSON
Administrative Law Judge

MEMORANDUM

The basis for this action is as follows. The Respondent is engaged in the business of excavating. On September 28, 1992, two of Respondent's field supervisors, Dale and Dan Hanus, were in the process of unloading a Vomatsu tiltadozer (a small bulldozer) off of a trailer in order to perform certain excavating work. The truck tractor and trailer were parked across a residential road that had a 7 percent slope down the hill to the west. Dan Hanus climbed aboard the bulldozer and started to back it off the trailer. The midsection of the trailer had a wooden deck, and the rear section was made of metal. When the bulldozer backed off the wooden deck and onto the metal section of the trailer, it slid sideways and rolled off the trailer into the street on its left side,

The bulldozer was equipped with a rollover protectives by structure (ROPS). It did not, however, have a seatbelt. Dan Hanus had removed the seatbelt approximately a year before when the machine was overhauled. When the bulldozer rolled off the trailer, Dan Hanus' head was crushed between the ROPS and the ground and he was killed.

Charlie Young Bird, an investigator with the Minnesota Occupational Safety and Health Division (OSHD), conducted an investigation of this accident. As a result of his investigation, OSHD issued a citation to Respondent for a serious violation of 29 CFR 1926.602 (a)(2)(i) and 1926.28 (a), which require that a seatbelt be provided on bulldozer like that involved in this case and that appropriate personal protective equipment be worn by employees in all operations where there is exposure to hazardous conditions, respectively. The citation, which was issued on November 13, 1992, set an abatement date of November 19, 1992, and assessed a penalty of \$4,700.00. Respondent timely contested the citation and a complaint was issued by the Department on February 9, 1993 and an answer filed by the Complainant on March 11, 1993. A Motion for Summary Judgment was filed by the Complainant on April 19, 1993. The Respondent was directed to file a response to the motion by June 30, 1993. No response was filed.

29 CFR 1926.602 (a)(2)(i) provides that "seatbelts shall be provided on

all equipment covered by this section" Section 1926.602 (a) states that equipment "covered by this section" includes "bulldozers, off-highway trucks, graders, agricultural and industrial tractors, and similar equipment." Consequently, 1926.602 (a)(2)(i) clearly applies to the tiltadozer involved in the accident in this case.

29 CFR 1926.28 (a) requires that the employer be "responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees." There was obviously an exposure to hazardous conditions in this case, resulting from the operation of a tiltadozer equipped with a roll-over protective structure without a seatbelt. Respondent was therefore responsible for requiring the wearing of a seatbelt during the operation of the machine.

There is no doubt that this was a serious violation of OSHD standards due to the fact that an employee was killed as a direct result of the violations, The OSHD investigator, Charlie Young Bird, proposed a penalty of \$4,700.00 which was calculated using the formula set forth in the field compliance manual used by the Department. Nothing has been submitted to suggest that the penalty was not appropriately calculated or that there are mitigating circumstances. Consequently, the proposed penalty must be affirmed.I/

P C. E.

I/ This Judge has held on previous occasions that although deference must be given to field compliance manual penalty calculations, mitigating factors may be considered which would result in a lessening of the penalty. However, Respondent's failure to inform the Judge by responsive affidavits that mitigating factors were present obviates the necessity for an evidentiary hearing on those issues.